No. SC93120

IN THE

Supreme Court of Missouri

CLAYTON DEAN PRICE,

Respondent,

v.

STATE OF MISSOURI,

Appellant.

Appeal from the Taney County Circuit Court
Thirty-eighth Judicial Circuit
The Honorable J. Edward Sweeney, Judge

APPELLANT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
(573) 751 3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from a Taney County Circuit Court judgment granting Mr. Price's Rule 29.15 motion. The state is authorized to appeal in civil cases under § 512.020, RSMo 2000; the state is authorized to appeal in criminal cases under § 547.200.2, RSMo 2000. The state appealed, and this case was initially heard by the Missouri Court of Appeals, Southern District. MO. CONST., Art. V, § 3; *see* § 477.060, RSMo 2000. After opinion by the Court of Appeals, this Court granted the state's application for transfer pursuant to Rule 83.04. This Court has jurisdiction. MO. CONST., Art. V, § 10.

STATEMENT OF FACTS

The state appeals a Taney County Circuit Court judgment granting Mr. Price relief on his untimely filed Rule 29.15 motion. Mr. Price filed his post-conviction motion more than four years out of time. However, the motion court granted Mr. Price leave to file out of time, finding that Mr. Price had been "abandoned" by his direct appeal counsel (PCR L.F. 75-79). The motion court then granted two of Mr. Price's post-conviction claims after an evidentiary hearing (*see* PCR L.F. 80-130).

* * *

Several years ago, a jury found Mr. Price guilty of statutory sodomy in the first degree, § 566.062, RSMo 2000. *State v. Price*, 165 S.W.3d 568, 570 (Mo.App. S.D. 2005). The trial court sentenced Mr. Price to twelve years' imprisonment. *Id.* at 572. On direct appeal, the Court of Appeals summarized the facts of Mr. Price's offense as follows.

> M.A. ("Victim"), born June 16, 1995, lived primarily with her paternal grandmother, [J.G.] ("[Grandmother]"), for the first nine months of her life. From approximately March 1996 to March 2002, Victim resided with her mother, [T.C.] ("Mother").
>
> Mother began dating Defendant in December 2001, and he moved into her home one month later. On the morning of March 11, 2002, Victim called [Grandmother] from Mother's house and

asked her "to come and pick me up." She told [Grandmother] that Defendant and Mother had been hurting her.

When [Grandmother] arrived, she found Victim crying, shaking, and terrified. After discussions among [Grandmother], Mother and Victim's maternal grandmother, it was agreed Victim would go to [Grandmother's] house after [Grandmother] got off work. That evening, Victim "was still scared" and "would not talk about anything."

Three days later, Victim told [Grandmother] that Defendant touched her vagina and anus. The next morning (Friday), [Grandmother] reported this to the Division of Family Services. On Monday (March 18), Victim was examined by Mitzi Huffman ("Nurse Huffman"), a nurse practitioner with the local child advocacy center. After a general physical examination, Nurse Huffman sought to examine Victim via "colposcopy."[1] This proposed examination upset Victim and she "became extremely hysterical," exclaiming "you're not going to touch me, you're not going to put anything inside of me."

[1] This was explained as a "video physical exam" with a "very magnified view of the female genitalia."

Ultimately, the procedure began after explanations and other attempts to calm Victim. Even so, Nurse Huffman characterized the examination as "inadequate" in that she was unable to complete it. The colposcopy videotape was reviewed by Dr. Lawrence Huffman ("Huffman"), who also worked at the child advocacy center.[2] He testified that it was "inadequate in many respects in terms you couldn't see inside [the vagina] very well." However, he did note a "scratch" that was "inside the outer edge of the vagina."

After the physical examination, Victim told Nurse Huffman that Defendant "hurt me, he put his fingers inside of me three times." Victim then recounted, via a diagram, where Defendant touched her.

Due to the inadequacy of the first vaginal examination, Victim was asked to undergo another such examination. She did so on March 27, 2002. After this second procedure, another videotaped interview of Victim was conducted. During this, Victim again told Nurse Huffman Defendant had touched her. When asked to indicate on a diagram of a female body where the touching occurred, Victim marked the genital and rectal part of

[2] Dr. Huffman and Nurse Huffman were husband and wife.

the diagram.

Victim's at-trial testimony was that Defendant penetrated her vagina and anus with his fingers.[3] Victim also told the jury that Defendant threatened to kill her and her paternal grandparents if she reported the abuse. She also testified that Cathy Adams, her maternal grandmother, told her to lie by telling the authorities that she made up the abuse allegations.

Defendant testified on his own behalf and told the jury that he did not sexually abuse Victim. Another defense witness (Mother) testified Victim wanted to live with [Grandmother], and this desire was heightened "every time [Victim] would get mad at [Mother], if [Mother] wouldn't let her do what she wanted to do." Mother told the jury Victim "was out of control" and a discipline problem. She also said she never saw Defendant inappropriately touch Victim and that Victim was alone with Defendant on only two occasions.

---

[3] Victim also testified that Defendant touched her with a knife and that "[h]e shoved it [the knife] in my butt and my pee-pee." Inexplicably, the knife "touching" was left unexplained and unexplored by either the State or the defense.

> Another defense witness (Victim's maternal grandmother) testified Victim told her "that she had lied" about the abuse. Finally, Dr. Robert Block, testifying for the defense, stated that the physical findings regarding Victim's rectum and vagina (as reported by the Huffmans) could not be linked to sexual abuse.
>
> After the case was given to the jury, it deliberated twenty minutes and returned a guilty verdict. The court sentenced Defendant to twelve years' imprisonment.

Price, 165 S.W.3d at 571-572 (footnotes renumbered). At sentencing, the trial court advised Mr. Price about Rule 29.15, and the court informed him that, if he appealed, he would have to file his post-conviction motion within ninety days of the appellate court's mandate (Tr. 347-348; *see* PCR L.F. 75).

Mr. Price appealed, and on June 29, 2005, the Court of Appeals affirmed Mr. Price's conviction and sentence. *Id.* at 568. The Court of Appeals issued its mandate on July 15, 2005.[4]

Under Rule 29.15, Mr. Price's initial post-conviction motion was due within ninety days after the mandate. Rule 29.15(b). Thus, the initial motion

---

[4] The mandate is contained in the Court of Appeals direct-appeal file in *State v. Price*, No. SD26318. A docket entry showing the date of the mandate is viewable on Missouri Case.net.

should have been filed by October 13, 2005. However, Mr. Price did not file an initial post-conviction motion by the deadline because his post-conviction counsel, "under the press of other business, missed the deadline, failing to pay attention to the correct deadline he had received at the sentencing hearing" (PCR L.F. 75). Post-conviction counsel "candidly admitted that the missed deadline was completely and entirely his fault," and he attributed "no fault or blame to Price" (PCR L.F. 75-76).

Approximately three months after the deadline, on January 17, 2006, Mr. Price filed a motion to recall the mandate in his direct appeal case, seeking to have a new mandate issued, to reset the deadline for filing his Rule 29.15 motion (*see* Motion to Recall the Mandate, filed January 17, 2006, in *State v. Price*, No. SD26318). On January 26, 2006, the Court of Appeals denied the motion to recall the mandate.

In December, 2006, Mr. Price filed a habeas petition in Texas County. *See State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 280 (Mo.App. S.D. 2008). In that case, the evidence showed that Mr. Price hired counsel to file a Rule 29.15 motion, but that post-conviction counsel "got his filing time mixed up, thinking he had twice as long (180 days) as he actually had (90 days)." *Id.* The Texas County Circuit court found, in pertinent part, that "Price was 'abandoned' by [post-conviction counsel] and entitled to relief from his procedural default for 'cause and prejudice' and 'manifest injustice[.]' " *Id.*

The circuit court vacated Mr. Price's conviction and remanded his case for a new trial. *Id.*

On review, the Court of Appeals reversed the circuit court and held that the circuit court had exceeded its authority in granting habeas relief. *Id.* at 285. The Court of Appeals rejected the circuit court's conclusion that Mr. Price had been abandoned by post-conviction counsel. *Id.* at 283 (citing *Bullard v. State*, 853 S.W.2d 921 (Mo. banc 1993), and distinguishing *McFadden v. State*, 256 S.W.3d 103 (Mo. banc 2008)). The Court of Appeals issued its opinion on September 30, 2008.

Mr. Price sought transfer, and, on January 27, 2009, this Court denied transfer (PCR L.F. 74). In its order, this Court stated that the application was "denied without prejudice to seeking relief, if any, pursuant to McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008)" (PCR L.F. 74).

About eleven months later, on December 31, 2009, Mr. Price filed a "Motion to Reopen 29.15 Proceedings and for Permission to File Rule 29.15 Motion Out of Time" (PCR L.F. 1, 6). The motion alleged that Mr. Price had hired post-conviction counsel to file a Rule 29.15 motion, and that post-conviction counsel assured Mr. Price that he would timely file the motion (PCR L.F. 7). The motion alleged that Mr. Price relied on that assurance, but that post-conviction counsel failed to timely file a Rule 29.15 motion (PCR L.F. 7). Relying on *McFadden v. State*, the motion asserted that post-

conviction counsel "completely abandoned him by failing to file the Rule 29.15 motion after he promised Price that he would do it" (PCR L.F. 10). The motion was accompanied by a Rule 29.15 motion (PCR L.F. 1).

On February 25, 2010, the state filed a response (PCR L.F. 60). The state argued that Mr. Price's Rule 29.15 motion should not be considered because it had been filed outside the time limits of Rule 29.15 (PCR L.F. 60). The state argued that the holding of *McFadden v. State*, was, by its own terms, limited to its specific, unique facts (PCR L.F. 61).

On July 16, 2010, the motion court took up Mr. Price's motion to file out of time (*see* PCR L.F. 75). On September 7, 2010, the motion court issued findings of fact and conclusions of law and concluded that Mr. Price would be permitted to file his Rule 29.15 motion out of time (PCR L.F. 75-79). The motion court found that post-conviction counsel told Mr. Price he would timely file a Rule 29.15 motion (PCR L.F. 75). The motion court found that post-conviction counsel, "under the press of other business, missed the deadline, failing to pay attention to the correct deadline he had received at the sentencing hearing" (PCR L.F. 75). The motion court found that post-conviction counsel attributed no fault to Mr. Price, and the court concluded "there is no evidence of any such fault or blame on Price, who reasonably relied upon the otherwise capable attorney he had hired to file the 29.15 motion on his behalf" (PCR L.F. 76). The motion court summarized the facts

as follows:

> [Post-conviction counsel] did not give Price any incorrect legal advice about the deadline for the 29.15 motion. The sentencing court had given both [post-conviction counsel] and Price the filing deadline. It was a simple failure of performance due to inattention to the deadline on [post-conviction counsel's] part, not a matter of bad legal advice. [Post-conviction counsel] overtly acted to prevent Price from taking other steps to make a 29.15 filing, by misleading Price into thinking [post-conviction] would file for him.

(PCR L.F. 76).

The motion court then set forth its legal conclusions and stated that it believed "that *McFadden* expanded the abandonment doctrine to a third class of abandonment, namely, the untimely filing of an original 29.15 motion where the movant bears no fault" (PCR L.F. 77). The motion court recognized the Court of Appeals opinion in *State ex rel. Nixon v. Sheffield*, *supra*—where the Court of Appeals had held in the habeas case that Mr. Price had not been abandoned—but the motion court opined that the "[Missouri] Supreme Court apparently felt that the *Sheffield* court read *McFadden* too narrowly, due to the unusual nature of the Supreme Court's language in denying transfer of *Sheffield* 'without prejudice to seeking relief, if any, under *McFadden*' " (PCR

L.F. 77). The motion court stated that "[a]ny discussion of the merits of Price's abandonment argument in *Sheffield* is . . . mere *obiter dicta*" (PCR L.F. 78). The motion court saw "no difference" between Mr. Price's case and cases like *Sanders*, *Luleff*[5] and *McFadden* (PCR L.F. 78). The motion court stated: "Price's attorney actively interfered with Price's ability to file a *pro se* 29.15 motion by assuring Price, directly and indirectly, that he would timely prepare and file the motion on Price's behalf" (PCR L.F. 78). The court, thus, permitted the filing of Mr. Price's untimely Rule 29.15 motion (PCR L.F. 79).

In March, 2011, the motion court held an evidentiary hearing on the claims asserted in Mr. Price's Rule 29.15 motion (PCR Tr. 2). Thereafter, on October 26, 2011, the motion court issued findings of fact and conclusions of law granting relief on some of the claims asserted in Mr. Price's motion (PCR L.F. 80-130).

On November 23, 2011, the state filed its notice of appeal (PCR L.F. 131). Mr. Price also filed a notice of appeal, but he subsequently requested that his appeal be dismissed. *See Price v. State*, No. SD31735 (docket entries available on Missouri Case.net).

On appeal, the state asserted that post-conviction counsel's conduct did

---

[5] *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991); *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991).

not constitute abandonment, and that, even assuming abandonment, Mr. Price had failed to file a motion alleging abandonment within a reasonable time (App.Br. 16-17). In a 2-1 decision, the Court of Appeals affirmed the circuit court's decision to re-open the case. *Price v. State*, No. SD31725, slip op. at 1 (Mo.App. S.D. 2012). The majority opinion held, based on *McFadden v. State*, that post-conviction counsel had abandoned Mr. Price by failing to timely file Mr. Price's initial post-conviction motion. *Id.* at 6-10. The majority declined to consider the state's second point, holding that because it had not been raised in the circuit court, it was not preserved for review. *Id.* at 10-11.

The dissenting opinion concluded that it was not clear that *McFadden* had overruled *Bullard v. State*, 853 S.W.2d 921 (Mo. banc 1991). *Price v. State*, SD31725, slip op. at 4-5 (Scott, P.J., dissenting). The dissenting opinion concluded that Mr. Price's case was more like a line of cases beginning with *Bullard*, which holds that "abandonment by an attorney does not excuse the untimely filing of an original post-conviction motion." *See id.* at 1, 4-5. The dissent observed that the Court in *McFadden* did not expressly overrule *Bullard* (and, in fact, cited it with approval). *Id.* at 4-5.

POINTS RELIED ON

I.

The motion court clearly erred in ordering Mr. Price's Rule 29.15 motion filed out of time and in granting relief on claims therein, because Mr. Price's post-conviction motion was untimely filed and he was not abandoned by post-conviction counsel (so as to allow an untimely filing), in that the motion was filed more than four years after the deadline, and post-conviction counsel's actions in telling Mr. Price that he would file an initial post-conviction motion and mistaking the deadline were not "active interference" that prevented Mr. Price from filing his initial motion within the time limits of Rule 29.15.

McFadden v. State, 256 S.W.3d 103 (Mo. banc 2008).

Bullard v. State, 853 S.W.2d 921 (Mo. banc 1993).

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012).

II.

The motion court clearly erred in ordering that Mr. Price's Rule 29.15 motion be filed more than four years out of time (and in granting relief on claims therein), because even if Mr. Price was abandoned by counsel, he failed to file his Rule 29.15 motion within a reasonable amount of time after the alleged abandonment took place, in that the alleged abandonment occurred in October, 2005, but Mr. Price did not file his post-conviction motion until December, 2009—long after the alleged abandonment came to his attention.

Gehrke v. State, 280 S.W.3d 54 (Mo. banc 2009).

Luleff v. State, 807 S.W.2d 495 (Mo. banc 1991).

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012).

ARGUMENT

I.

The motion court clearly erred in ordering Mr. Price's Rule 29.15 motion filed out of time and in granting relief on claims therein, because Mr. Price's post-conviction motion was untimely filed and he was not abandoned by post-conviction counsel (so as to allow an untimely filing), in that the motion was filed more than four years after the deadline, and post-conviction counsel's actions in telling Mr. Price that he would file an initial post-conviction motion and mistaking the deadline were not "active interference" that prevented Mr. Price from filing his initial motion within the time limits of Rule 29.15.

This Court should vacate the circuit court's judgment granting Mr. Price post-conviction relief. Mr. Price's motion was not timely filed, and there was no legal basis—*i.e.*, abandonment by post-conviction counsel—to permit the untimely filing of his motion more than four years out of time.

A. The standard of review

"Appellate review of a motion court's decision to allow a motion to file a post-conviction motion out of time is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Eastburn v. State*, No. SC92927, slip op. at 3 (Mo. banc 2013) (citing *Gehrke v. State*, 280 S.W.3d 54, 56 (Mo. banc 2009)). "Findings and conclusions are clearly

erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made." *Id.*

B. Mr. Price's post-conviction motion was untimely filed, and he was not abandoned by post-conviction counsel

On June 29, 2005, the Court of Appeals affirmed Mr. Price's conviction and sentence for one count of statutory sodomy in the first degree. *State v. Price*, 165 S.W.3d 568 (Mo.App. S.D. 2005). The Court issued its mandate on July 15, 2005.

Under the terms of Rule 29.15, Mr. Price's post-conviction motion was due by October 13, 2005—ninety days after the appellate court's mandate on direct appeal. Rule 29.15(b). Mr. Price hired private counsel to file a Rule 29.15 motion, and counsel assured Mr. Price that he would file the motion (PCR L.F. 76). However, post-conviction counsel "missed the deadline, failing to pay attention to the correct deadline he had received at the sentencing hearing" (PCR L.F. 75). Eventually, Mr. Price hired new counsel, and new counsel filed Mr. Price's post-conviction motion more than four years after the deadline, on December 31, 2009 (PCR L.F. 1, 7).

"Under normal circumstances, if a movant fails to file a Rule 29.15 motion within the 90–day time limit set by Rule 29.15(b), the motion is untimely and the motion court is compelled to dismiss it." *McFadden v. State*, 256 S.W.3d 103, 106 (Mo. banc 2008). Thus, unless there was a legal basis to

allow the untimely filing of Mr. Price's motion (*i.e.*, a cognizable claim of abandonment by post-conviction counsel), the motion court was compelled to dismiss it as untimely filed. *See id*; *see also Dorris v. State*, 360 S.W.3d 260, 268 (Mo. banc 2012) ("By failing to timely file, the movant has completely waived his right to proceed on his post-conviction relief claims according to the language of the Rules.").

Here, the motion court excused Mr. Price's untimely filing, concluding that Mr. Price was abandoned by post-conviction counsel (PCR L.F. 75-79). Specifically, the motion court found that post-conviction counsel assured Mr. Price that he would timely file a post-conviction motion, but that counsel then failed to follow through with his promise (PCR L.F. 75-76, 78). The motion court found that this failure to timely file a post-conviction motion was tantamount to the conduct that was found to constitute abandonment in *McFadden v. State* (PCR L.F. 78).[6] But because *McFadden*, by its own terms applied only to the unique circumstances present in that case, the motion court clearly erred in concluding that Mr. Price was abandoned.

---

[6] The motion court also cited *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), and *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), but those cases provide little guidance, as they dealt with abandonment by post-conviction counsel in filing an amended motion.

This Court has generally rejected claims of abandonment related to the filing of an initial, post-conviction motion. "An original motion . . . is relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." *Bullard v. State*, 853 S.W.2d 921, 922-923 (Mo. banc 1993). "As legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." *Id.*; *see Gehrke v. State*, 280 S.W.3d at 57 ("The movant is responsible for filing the original motion, and a lack of legal assistance does not justify an untimely filing.").

In *McFadden*, the Court carved out a limited exception to this rule. As the Court stated in a subsequent case, with regard to the filing of an initial post-conviction motion, "abandonment occurs when post-conviction counsel's overt actions prevent the movant from filing the original motion timely." *Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010) (citing *McFadden v. State*, 256 S.W.3d at 109). The question, then, is whether the exception recognized in *McFadden* or the rule stated in *Bullard* applies to Mr. Price's failure to timely file a post-conviction motion. The short answer is that *Bullard* is more closely analogous and should control the outcome of this case.

1. The unique circumstances of *McFadden* are not present here

In *McFadden*, the defendant was supposed to file his Rule 29.15 motion within ninety days of the appellate mandate. 256 S.W.3d at 105. After the

mandate issued, a public defender contacted the defendant and "directed him to send his Rule 29.15 motion for post-conviction relief directly to her[.]" *Id.* The public defender told the defendant that she would "hand-file it before the due date." *Id.* The defendant prepared, signed, and notarized his post-conviction motion; and then he sent the motion to his attorney sixteen days before the due date. *Id.* Counsel received the *pro se* post-conviction motion thirteen days before the due date, but she waited two weeks before filing the *pro se* motion. *Id.* Counsel ultimately filed the motion out of time. *Id.* The motion was then denied as untimely filed. *Id.*

On appeal, this Court recognized that "in very rare circumstances . . . our courts have found an improper filing, caused by circumstances beyond the control of the movant, justified a late receipt of the motion by the proper court." *Id.* at 108. For instance, the Court observed that a late filing was excused in *Nicholson v. State*, 151 S.W.3d 369 (Mo. banc 2004), "where a motion was filed within the 90-day time period but sent to the wrong court[.]" *Id.* The Court observed that in *Spells v. State*, 213 S.W.3d 700 (Mo.App. W.D. 2007), a late filing was excused where the movant timely prepared and mailed his motion five days prior to the due date but the court's post office box had changed (resulting in a subsequent untimely filing). *Id.* at 109.

The Court then pointed out that "as in *Nicholson* and *Spells* . . ., the record shows that Mr. McFadden timely prepared and mailed his motion—

and did so some two weeks prior to the filing deadline." *Id.* The Court then observed that counsel failed to file the motion by the deadline. *Id.* And, importantly, the Court observed that "[c]ounsel's failure did not occur due to a lack of understanding of the rule, out of an ineffective attempt at filing, or as a result of 'an honest mistake,' *none of which will justify failure to meet the time requirements*." *Id.* (emphasis added; citation omitted). Rather, the Court observed, "the public defender undertook to represent Mr. McFadden and then simply abandoned that representation" by failing to timely deliver a timely-drafted and timely-received post-conviction motion. *Id.*

The Court, thus, concluded that Mr. McFadden "did all he could to express an intent to seek relief under Rule 29.15, took all steps to secure this review, and was 'free of responsibility for the failure to comply with the requirements of the rule.' " *Id.* "Mr. McFadden, having been abandoned by counsel who undertook to perform a necessary filing and then simply failed to do so," was entitled to relief. *Id.*

At the same time, however, the Court "emphasize[d]" that its opinion was "limited to this specific factual scenario where counsel overtly acted and such actions prevented the movant's timely filing." *Id.* The Court then reiterated that "Mr. McFadden had timely prepared his motion for post-conviction relief and provided this motion to his counsel well before it was due to the court." *Id.* The Court reiterated that counsel had "actively

interfered with the timely filing" of the motion and did not file the motion until it was one day late. *Id.* The Court then concluded that "[s]uch active interference, as demonstrated here, constitutes abandonment." *Id.* "In these unique circumstances," the Court held, "the motion court is authorized to reopen the otherwise final post-conviction proceeding." *Id.*

The facts in Mr. Price's case do not match the "unique circumstances" of *McFadden*, and applying the abandonment doctrine in Mr. Price's case is an unwarranted expansion of the doctrine. Here, Mr. Price did not timely prepare his initial post-conviction motion, and he did not timely mail his motion "well before it was due" in an attempt to have it timely filed (*see* PCR L.F. 75-76). He retained counsel for the purpose of filing a Rule 29.15 motion, but he was not *prevented* from filing an otherwise timely-prepared motion by counsel's overt actions or "active interference." Rather, as the motion court found, post-conviction counsel took on the task of drafting a motion but was "inattent[ive] to the deadline" and simply failed to file within the time limits (PCR L.F. 76). But as the Court stated in *McFadden*, counsel's error in following the rule or "honest mistake" does not "justify failure to meet the time requirements." *Id.* at 109.

In short, this case does not involve the sort of "active interference" with the otherwise timely filing of a post-conviction motion that occurred in *McFadden*. Mr. Price never prepared a motion within the time limits that he

was prevented from filing; he was free to file a post-conviction motion at any time (and was aware of the time limit); and counsel did not instruct Mr. Price to refrain from filing a motion or otherwise actively prevent him from doing so. As such, while counsel may have been careless in following the rule, counsel did not prevent Mr. Price from timely filing his initial post-conviction motion. Rather, counsel simply provided poor legal assistance, and such conduct does not rise to the level of abandonment. *See Bullard v. State*, 853 S.W.2d at 922-923; *see generally Reuscher v. State*, 887 S.W.2d 588, 590 (Mo. banc 1994) (although not addressing a claim of abandonment, the Court rejected a claim that counsel's inaction should excuse the defendant's untimely filing, in part, because defendant "could have filed his motion for post-conviction relief at any time after conviction and sentence"). *See also Moore v. State*, 328 S.W.3d 700, 702 (Mo. banc 2010) (rejecting a claim of abandonment based on direct appeal counsel's failing to tell the defendant when the appellate mandate issued); *Clark v. State*, 261 S.W.3d 565, 567 (Mo.App. E.D. 2008) (rejecting a claim of abandonment even though direct appeal counsel incorrectly "informed [the defendant] that he had until 90 days after the United States Supreme Court ruled on his certiorari petition to file his Rule 29.15 motion").

2. Mr. Price's case is more like *Bullard v. State*

In *Bullard v. State*, 853 S.W.2d 921, as here, the defendant's direct

appeal counsel agreed to also represent the defendant in his Rule 29.15 proceedings. *Id.* Counsel then erroneously "told [the defendant] that a 29.15 motion could be timely filed after the appellate court ruled on the direct appeal." *Id.* But, in fact, the Rule 29.15 motion had to be filed before the appeal concluded. *Id.* Neither counsel nor the defendant filed a post-conviction motion by the deadline. *Id.* The defendant later filed a Rule 29.15 motion about eight months out of time, but the motion was dismissed as untimely filed. *Id.*

On appeal, the defendant alleged that he was abandoned by counsel, but this Court concluded that counsel's incorrect advice about the time limits was not a recognized form of abandonment. *Id.* at 922-923. The Court pointed out that abandonment (as defined at that time) occurred when counsel failed to file, or failed to timely file, an amended motion. *Id.* The Court then declined to extend abandonment to the filing of the initial *pro se* motion because the *pro se* motion "is relatively informal, and need only give notice to the trial court, the appellate court, and the State that [the defendant] intends to pursue relief under Rule 29.15." *Id.* The Court stated that "[a]s legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." *Id.* at 923. The same is true here.

While *Bullard* was decided before *McFadden*, this Court made plain in

McFadden that counsel's ineffective actions in *Bullard* did not rise to the level of conduct that constituted "abandonment" under *McFadden*'s limited expansion of the concept under its unique facts. *McFadden*, 256 S.W.3d at 108. The Court stated:

> the state is correct that *Bullard* held that ineffective assistance of counsel in informing his client when a post-conviction motion is due does not constitute abandonment. That is not what occurred here, however: the public defender accurately told Mr. McFadden when his motion had to be filed, but she then told him to give it to her for filing and then simply abandoned that undertaking.

Id.

In other words, consistent with *Bullard*, when counsel is apparently ineffective in filing an initial post-conviction filing, *i.e.*, in providing legal advice or assistance, such ordinary errors do not constitute abandonment. *Id.* Such errors—*e.g.*, a misunderstanding of the rule, or an "honest mistake"—do not justify a late filing. *Id.* at 109. *See generally Barnett v. State*, 103 S.W.3d 765, 774 (Mo. banc 2003) ("This Court has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel."). To excuse a late filing under the limited exception recognized in *McFadden*, an attorney must have actively interfered and prevented the movant's otherwise timely filing of a post-conviction motion

(*i.e.*, by appropriating an otherwise timely motion and preventing its timely filing). *See generally State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 280-285 (Mo.App. S.D. 2008) (stating that Mr. Price was not abandoned by post-conviction counsel; that the court was "bound by *Bullard v. State*"; that *McFadden* was distinguishable because there counsel "overtly acted," "actively interfered," and "prevented" the timely filing of the motion; and that post-conviction counsel's "lack of understanding of the rule" or "honest mistake" will not justify an untimely filing).[7] In short, the Court did not overrule *Bullard* in *McFadden*, and it should not do so now.

3. Expanding the exception recognized in *McFadden* is not warranted

In Mr. Price's case, privately-retained counsel failed to meet the filing deadline because "the press of other business" caused him to overlook the deadline for filing. This Court has never excused an untimely filing under

[7] The motion court refused to be bound by the Court of Appeals decision in *Sheffield*, in part based on its belief that this Court "apparently felt that the *Sheffield* court read *McFadden* too narrowly" (PCR L.F. 77, citing this Court's order denying transfer). But while this Court's order advised Mr. Price of the appropriate avenue for seeking relief, the Court made plain that "relief, if any," would have to be determined in the appropriate forum. The order did not state that *McFadden* applied to Mr. Price's circumstances.

Rule 29.15 for this sort of ordinary failure by either post-conviction counsel or a *pro se* movant. To the contrary, in *McFadden*, the Court reiterated that such mistakes will not justify failing to meet the deadline. *McFadden*, 256 S.W.3d at 109.

The problem in *McFadden* was not simply that counsel had failed to file the post-conviction motion by the deadline; rather, the problem was that counsel "actively interfered" with the movant's timely filing of his post-conviction motion and "prevented" the movant from timely filing his motion. In short, in a case where the movant had done everything he was required to do, and where counsel's interference then thwarted what would have been a timely filing, the movant could claim abandonment.

In Mr. Price's case there was no similar interference. Mr. Price did not draft a *pro se* motion, and he did not have his timely-prepared motion diverted and delayed by an interloping attorney. Unlike the movant in *McFadden*, Mr. Price's personal efforts were not thwarted, and he was not prevented from filing his post-conviction motion. Rather, Mr. Price hired an attorney, and his attorney simply missed the deadline. This was not the sort of scenario contemplated in *McFadden*, and the abandonment doctrine should not be expanded to encompass such ordinary failures.

Indeed, if the doctrine of abandonment is expanded to include such circumstances, it will create a disparity between those who can afford to hire

private attorneys and those who cannot. Those who cannot afford to hire an attorney will be personally responsible for missing the initial deadline of Rule 29.15 (unless the unusual and unique circumstances of *McFadden* arise), but those who can afford to hire an attorney will not be personally responsible for missing that deadline. The inequity of such a rule is obvious, and it runs counter to the Court's general policy of not placing indigent, unrepresented litigants at a disadvantage to represented litigants. *See Nicholson v. State*, 151 S.W.3d at 371 n. 1 (". . . there is no legal or just basis for holding [an incarcerated, *pro se* litigant] to a higher standard of legal competence than that of experienced attorneys representing clients in other civil matters.").

Not only does such a rule create disparity between the indigent and non-indigent by giving the non-indigent an exception to the otherwise mandatory time limits of the rule, but it runs contrary to a well-settled principle of agency law, namely, that "the principal bears the risk of negligent conduct on the part of his agent." *See Maples v. Thomas*, 132 S.Ct. 912, 922 (2012). In Mr. Price's case, where he was not "prevented" from completing his otherwise timely filing, and where his hired agent merely failed to file a timely motion, the appropriate rule should be that "when a petitioner's post-conviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish" abandonment. *See generally id.* In short, Mr. Price should be responsible for the failure of his

agent, and, to the extent that *McFadden* carved out an exception to this rule under the unique circumstances present in that case, the exception should remain limited to the sort of active interference that took place in *McFadden*.

Finally, while it may be that post-conviction counsel's performance was deficient, this Court has repeatedly held that the abandonment doctrine should not be expanded to include claims of ineffective assistance of post-conviction counsel. *See McFadden*, 256 S.W.3d 103 ("the state is correct that *Bullard* held that ineffective assistance of counsel in informing his client when a post-conviction motion is due does not constitute abandonment"); *Gehrke v. State*, 280 S.W.3d at 58 ("This Court 'has repeatedly held it will not expand the scope of abandonment to encompass perceived ineffectiveness of post-conviction counsel.' "). Here, counsel's conduct in filing a post-conviction motion was deficient, but counsel did not intercept and delay Mr. Price's otherwise timely motion. Thus, counsel was, at most, ineffective; the limited species of abandonment that the Court recognized in *McFadden* should not be expanded to encompass such errors.

C. Conclusion

In sum, Mr. Price's post-conviction motion was filed more than four years out of time. Mr. Price made no attempt to file his post-conviction motion within the time limits of the rule, and Mr. Price was not prevented from doing so by "active interference" on the part of his attorney. Rather, Mr.

Price just missed the deadline. As such, the motion court's finding of abandonment to excuse the late filing based on post-conviction counsel's "inattention" to the time limits was clearly erroneous because mere deficient performance does not justify an untimely filing. The motion court's judgment should be vacated.

II.

The motion court clearly erred in ordering that Mr. Price's Rule 29.15 motion be filed more than four years out of time (and in granting relief on claims therein), because even if Mr. Price was abandoned by counsel, he failed to file his Rule 29.15 motion within a reasonable amount of time after the alleged abandonment took place, in that the alleged abandonment occurred in October, 2005, but Mr. Price did not file his post-conviction motion until December, 2009—long after the alleged abandonment came to his attention.

In the alternative to the argument made in Point I, appellant further asserts that the trial court clearly erred in ordering the untimely filing of Mr. Price's motion because, even if post-conviction counsel abandoned Mr. Price, Mr. Price did not file his post-conviction motion within a reasonable time.

A. The standard of review

"Appellate review of a motion court's decision to allow a motion to file a post-conviction motion out of time is limited to a determination of whether the motion court's findings and conclusions are clearly erroneous." *Eastburn v. State*, No. SC92927, slip op. at 3 (Mo. banc 2013) (citing *Gehrke v. State*, 280 S.W.3d 54, 56 (Mo. banc 2009)). "Findings and conclusions are clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm impression that a mistake has been made." *Id.*

B. The motion court clearly erred in ordering the untimely filing of Mr. Price's post-conviction motion

Even if this Court were to conclude that post-conviction counsel abandoned Mr. Price, the Court should still vacate the motion court's judgment because Mr. Price failed to file his motion to file out of time within a reasonable amount of time. "When considering the scope of abandonment, this Court must balance the need to protect the rights of postconviction movants against the need for finality and a reasonable end to postconviction proceedings." *Gehrke v. State*, 280 S.W.3d at 58.

In *Gehrke*, in declining to expand the abandonment doctrine to the failure to file a notice of appeal from denial of relief in post-conviction proceedings, the Court observed that "Rule 30.03 allows a movant to seek a special order permitting a late filing of the notice of appeal." *Id.* The Court observed that "[w]hile a notice of appeal normally must be filed within 10 days after a judgment becomes final, Rule 30.03 permits a movant, for good cause shown, to file a late notice of appeal within 12 months after judgment becomes final, if the movant receives leave of court to file out of time." *Id.* The Court then observed that "[o]ne year is sufficient time for a movant to discover that postconviction counsel has not filed, or not filed properly, a notice of appeal within the required 10–day period and to correct counsel's failure to act." *Id.* The Court then concluded that "[w]hile this Court's ruling

places a burden on a movant to ascertain whether a proper notice of appeal has been filed timely, it is not an unreasonable burden." *Id.*

There is no similar one-year rule here. But in cases where counsel is inattentive to the deadline for filing a post-conviction motion, this Court should likewise "balance the need to protect the rights of postconviction movants against the need for finality and a reasonable end to postconviction proceedings." Thus, if the abandonment doctrine is going to be extended to cases like Mr. Price's case, a reasonable limit on the time for filing should be imposed. In other words, a movant who is abandoned should not be granted more time (after the abandonment is known to the movant) than other post-conviction litigants would have in other cases of abandonment.

In *Luleff v. State*, 807 S.W.2d 495, 498 (Mo. banc 1991), post-conviction counsel entirely failed to file an amended motion; thus, it appeared that counsel may have abandoned the movant, and the Court remanded the case for a hearing to determine whether the fault lay with counsel. But in discussing the appropriate remedy for abandonment, the Court stated that if the motion court found abandonment, "the court shall appoint new counsel, allowing time to amend the pro se motion, if necessary, as permitted under Rule 29.15(f)" (footnote omitted). In other words, in the case of abandonment, new counsel would have the time allowed under the rule to file an amended motion. (Admittedly, Mr. Price's case differs significantly from *Luleff*, because

in Mr. Price's case, counsel failed to file the original post-conviction motion (as opposed to an amended motion). But, while different, the *Luleff* case does provide principles to consider in crafting equitable relief.)

Here, the alleged abandonment—counsel's failing to file the initial motion—was quickly discovered; but instead of filing a post-conviction motion and seeking to file it out of time due to abandonment, Mr. Price waited some months and filed a motion to recall the mandate in his direct appeal case. He then waited several more months and filed a habeas petition in Texas County. *See State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 280 (Mo.App. S.D. 2008). Then, after the Court of Appeals reversed in *Sheffield* (and found that Mr. Price had not been abandoned), and after this Court denied transfer (and suggested the appropriate avenue for seeking relief, if any), Mr. Price waited another eleven months before filing his motion seeking leave to file his post-conviction motion out of time (PCR L.F. 1, 6, 74). These lengthy delays, occasioned as they were by Mr. Price's failure to expeditiously file an appropriate motion should operate to bar the untimely filing of Mr. Price's Rule 29.15 motion.

"The time limits in Rules 24.035 and 29.15 'serve the legitimate end of avoiding delay in the processing of prisoner's claims and prevent the litigation of stale claims.' " *Dorris v. State*, 360 S.W.3d 260, 269 (Mo. banc 2012). Consistent with this general purpose, the abandonment doctrine

should be narrowly construed, and the time for filing out-of-time motions in cases of abandonment should be limited to a reasonable time (*i.e.*, time limits that comport with the time limits of the rule) after the abandonment becomes known to the post-conviction movant.[8]

Stated another way, Mr. Price is guilty of laches. " 'Laches' is neglect for unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Hagely v. Board of Educ. Of Webster Groves School Dist.*, 841 S.W.2d 663, 669 (Mo. banc 1992). "Mere delay does not of itself constitute laches; the delay involved must work to the disadvantage and prejudice of the [adverse party]." *Id.*

Here, Mr. Price delayed for years—including eleven months after this Court suggested the appropriate forum for his motion—before seeking to file his post-conviction motion out of time. This lengthy delay is unexplained and

---

[8] In *Gehrke v. State*, while the Court found it unnecessary to consider the movant's five-year delay in filing his motion to re-open, the Court seemed to acknowledge that a delay in filing a post-conviction motion could serve to limit a post-conviction litigant's ability to re-open the case. 280 S.W.3d at 69 n. 6 ("Since the Court decides that expansion of the scope of abandonment is not warranted, the length of Mr. Gehrke's delay in filing his motion to reopen is not considered.").

unreasonable. Mr. Price could have immediately asserted abandonment in the sentencing court.

Additionally, the delays were prejudicial to the state because any re-trial will be much more difficult due to the excessive passage of time. "In that event, the state could be prejudiced by lost or destroyed evidence and witnesses who are no longer available." *See State v. Troupe*, 891 S.W.2d 808, 811 (Mo. banc 1995). "Further, over time, witnesses' memories fade, subjecting them to impeachment and consequent diminished credibility." *Id.*

Mr. Price may argue as he did in the Court of Appeals that the state waived its unreasonable-delay argument by not asserting it in the motion court. It is true that, generally, if a claim is not presented to the motion court, it cannot be asserted on appeal. But because Mr. Price's motion to file out of time sought to overcome (and ultimately did overcome) the mandatory time limit of Rule 29.15 for the filing of an initial post-conviction motion, the state submits that it was not possible for the state to waive this claim.

In *Dorris v. State*, 360 S.W.3d at 268, this Court stated that "[i]t is the court's duty to enforce the mandatory time limits and the resulting complete waiver in the post-conviction rules—even if the State does not raise the issue" in the motion court. Stated another way, "[t]he State cannot waive movant's noncompliance with the time limits in Rules 29.15 and 24.035." *Id.*

Here, Mr. Price was seeking to file his initial post-conviction motion

outside the time limits of Rule 29.15—*i.e.*, he was attempting to overcome the otherwise "complete waiver" that followed his failure to file a timely motion. *See id.* at 267-268. Accordingly, it was the motion court's obligation, and it is this Court's obligation, to enforce the mandatory time limits of the rule—even if the state failed to object or make certain arguments in the motion court. *See id.* at 268.

In other words, if the state cannot waive the time limits of the rule, it stands to reason that the state cannot *effectively* waive the time limits by failing to make an argument against an alleged exception to the time limits. In *Dorris*, the Court placed the burden on the movant to allege and prove facts showing that the motion was timely filed, that the motion was misfiled in the wrong court, or that the movant fell "within a recognized exception to the time limits." *Id.* at 267. The failure to do so results in a "complete waiver" of any right to proceed under the rule. *Id.* at 267-268. "The phrase 'complete waiver' here establishes a total, absolute relinquishment of a legal right." *Id.*

Because of the absolute nature of the waiver that accompanies a failure to timely file, it is not the state's burden to allege or prove anything when a movant seeks to take advantage of an exception to the otherwise mandatory time limits of the rule. Accordingly, even if the state were to agree to an untimely filing according to an alleged exception such as abandonment, it would remain this "court's duty to enforce the mandatory time limits and the

resulting complete waiver in the post-conviction rules[.]" *Id.* at 268.

In short, the mandatory time limits of the rule, the state's inability to waive the time limits of the rule, the movant's burden to allege facts warranting an exception, and the absolute waiver that accompanies a movant's failure to timely file, all support the conclusion that the state cannot waive arguments against an exception to the mandatory time limit of Rule 29.15.

C. Conclusion

Appellant does not concede that Mr. Price was abandoned, but if this Court were to determine that he was, the motion court nevertheless clearly erred in permitting Mr. Price to file his Rule 29.15 motion more than four years out of time. Mr. Price knew within a few months of the deadline that post-conviction counsel had not filed a post-conviction motion, and Mr. Price had also been advised of the ninety-day limit by the sentencing court (Tr. 347-348). But despite his knowledge, Mr. Price delayed approximately four years before seeking to file his Rule 29.15 motion out of time. And even if the time litigating his habeas petition is excluded, Mr. Price delayed for about a year before he filed his habeas petition, and he delayed for nearly another year after the habeas litigation had concluded. Such delays run contrary to the general purposes of Rule 29.15, and the abandonment doctrine should not be expanded to encompass them when the alleged abandonment was known

to the movant. The motion court's judgment should be vacated.

CONCLUSION

The Court should vacate the motion court's judgment and remand this case with an order to dismiss Mr. Price's untimely filed Rule 29.15 motion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with Rule 84.06(b) and contains 8,694 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System this 5th day of July, 2013, to:

GINGER K. GOOCH
901 St. Louis Street, Suite 1800
Springfield, MO 65806
Tel.: (417) 268-4000
Fax: (417) 268-4040
ginger.gooch@huschblackwell.com

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Appellant